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No. ——

In The

Supreme Court of the United States

October Term, 1997

PETER D. BOGART, an individual; OJAVAN INVESTORS, INC., a corporation; PORT LEMOORE CORPORATION, a corporation; SUTTON PROPERTIES, INC., a corporation; SEALUBBER, INC., a corporation; PAKID HOLDINGS, INC., a corporation; MALEK AGENCY LTD., a corporation; QUELIMANE CO., a corporation; MTG ALLIANCE CORP., a corporation; HIGHLAND GROUP, INC., a corporation; AND P.U. ENTERPRISES, a corporation;

Petitioners,

v.

THE CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California (California Supreme Court No. S061480; California Court Of Appeal, Second Appellate District, Division 2, Civ. No. B103320)

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Petitioners' First Amendment right to speak and to petition the government for redress in a limited, non-judicial public forum expressly designated for that purpose by the California Code of Regulations, Section 13188(b), can be barred by the doctrine of 'unclean hands', particularly when to allow such an exercise of Petitioners' rights would neither aid nor perpetuate any illegal, immoral or otherwise wrongful activity but rather could in fact alleviate the 'unclean hands' complained of by Respondents?

PARTIES TO THE PROCEEDING

The following, and no others, are parties to the instant proceedings:

Petitioners Peter D. Bogart, Ojavan Investors, Inc., Port Lemoore Corporation, Sutton Properties, Inc., Sealubber, Inc., Pakid Holdings, Inc., Malek Agency Ltd., Quelimane Co., MTG Alliance Corp., Highland Group, Inc., and P.U. Enterprises, were the Petitioners for Writ of Mandate in the Los Angeles Superior Court below, as well as the Appellants before the Court of Appeal of the State of California below, and the Petitioners for Review to the Supreme Court of the State of California below. None of the corporate petitioners have any parent or subsidiary companies.

Respondent is the California Coastal Commission, who was the Respondent and Appellee below. The California Coastal Commission is a California state administrative agency vested with quasi-judicial powers and supported in part by federal grants pursuant to 16 U.S.C. §§ 1451, 1454 et seq.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully seeks certiorari to review the judgment and opinion of the Court of Appeal of the State of California in the Second Appellate District, Petition for Review having been denied by the Supreme Court of the State of California, on the grounds that said decision as a matter of law erroneously applies the doctrine of unclean hands to disentitle Petitioners from the exercise of their First Amendment rights under the United States Constitution.

I.

CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Appeals for the State of California in the Second Appellate District was entered on April 7, 1997, and is reproduced herein at Petitioners' Appendix App. A-1. The Opinion was ordered unpublished, and the Court of Appeals Docket No. was 2d Cir. B103320.

The Petition for Review was denied by the Supreme Court of the State of California by Order entered July 9, 1997, Docket No. S061480, and said Order is reproduced herein at Petitioners' Appendix App. F-1. Remittitur was entered on July 25, 1997, and the Notice of Remittur is reproduced herein at Petitioners' Appendix App. G-1.

The Judgment of the Los Angeles Superior Court sustaining Respondent's demurrer was entered on April 19, 1996, and is reproduced herein at Petitioners' Appendix App. A-1. The transcript of the proceedings before the Superior Court, L.A.S.C. No. SS006369, is reproduced

herein at Petitioners' Appendix App. C-1, and the verified Petition for Writ of Administrative Mandamus is reproduced at Petitioners' Appendix App. D-1. The Application and Request to Modify, Rescind and cancel the Cease and Desist Order, made to the Respondent California Coastal Commission on September 13, 1995, is reproduced herein at Petitioners' Appendix App. E-1.

The separate Judgment of the Los Angeles Superior Court under which Petitioner Bogart is charged with contempt is also the subject of a Petition for Certiorari before this Court, filed concurrently herewith.

II.

JURISDICTIONAL STATEMENT

The final judgment denying review by the Supreme Court of California was entered on July 9, 1997. Because the highest court of the State of California has denied further review and the instant action concerns the denial of a fundamental federal constitutional right, jurisdiction lies with this United States Supreme Court on Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257.

III.

STATUTES INVOLVED IN THIS CASE

The constitutional provision involved in this action is as follows:

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The statutory provision involved in this case are as follows:

The California Code of Regulations, Title 14 § 13188(b):

> § 13188. Rescission or Modification of Cease and Desist Orders.
>
> (a) . . .
>
> (b) The [C]ommission, after public hearing, may rescind or modify a cease and desist order that it has issued. A proceeding for such a purpose may be commenced by (1) any person to whom the cease and desist order is directed, (2) the executive director, or (3) any two members of the [C]ommission. Upon receipt of a request pursuant to this subsection (b) for rescission or modification of a cease and desist order issued by the Commission, a hearing on the request shall be held at the next regularly scheduled meeting or as soon thereafter as is practicable after notice to all persons subject to the order or whom the executive director otherwise has reason to know would be interested in the matter.

California Public Resources Code § 30801:

> Any aggrieved person shall have a right to judicial review of any decision or action of the commission for a writ of mandate in accordance

with Section 1094.5 of the Code of Civil Procedure, within 60 days after the decision or action becomes final.

IV.

STATEMENT OF THE CASE

A. Procedural Summary

Petitioners are parties holding various interests in certain vacant lands lying within the California Coastal zone and which are thereby under the jurisdiction of the Respondent, the California Coastal Commission [Joint appendix ("JA"), pp. 002[1] Petitioners are subject to a permanent cease-and-desist order issued by Respondent on August 20, 1992, the first ever cease-and-desist order issued under the Coastal Act. [JA p.002, 015] The Order prohibits the sale, conveyance or transfer of any interest in said properties unless there has been compliance with certain terms and provisions of the Declarations of Restrictions recorded against the properties, specifically the recombination of 72 lots into just 2 large parcels. [JA pp. 002, 015-037]

On September 13, 1995, pursuant to C.C.R. § 13188(b), Petitioners made a formal application to the Coastal Commission to convene a hearing regarding the modification, rescission and cancellation of the Order, a request expressly allowed by the cease-and-desist order itself. [JA pp. 004, 039-046; App. E-1]

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[1] As used throughout this brief, the designation "JA" refers to the Joint Appendix filed with the Court of Appeals, which constitutes the entire record in the Superior Court.

However, in a letter dated October 17, 1995, Respondents refused to convene such a hearing, a refusal confirmed by a letter from Respondents to Petitioners dated December 5, 1995. [JA pp. 004, 048-050, 054-056] Refusal to hold a hearing upon request violates California Code of Regulations, Title 14, § 13188(b). [JA pp. 048-056] Consequently, Petitioners filed a Petition for Writ of Mandamus pursuant to Code of Civil Procedure § 1094.5 and Pub. Res. C § 30801. [JA p. 001]

On or about March 11, 1996, Respondents filed a Notice of Demurrer and Demurrer to Petition [JA p. 078], accompanied by a Request for Judicial Notice [JA p. 092] and Motion for Sanctions. [JA p. 215] Petitioners opposed the Demurrer and Request for Sanctions on March 25, 1996 [JA pp. 278, 297], to which Respondents' filed reply briefs on March 28, 1996 [JA pp. 306, 391], and on April 19, 1996, Respondent's proposed judgment was signed and entered as he final Judgment sustaining the demurrer and granting the request for sanctions as to Petitioners only. [JA p. 337]

The California Court of Appeals affirmed the lower court's decision with respect to just one of the four grounds asserted by Respondent, namely that Petitioner's First Amendment claim of right to a bearing was barred by the doctrine of unclean hands, inasmuch as Petitioner is in contempt of a separate state appellate court judgment ordering rescission of the transfer of the subject properties. The Supreme Court of California denied further review on July 9, 1997.

B. The Federal Issue Sought To Be Reviewed

Petitioners first raised the constitutional argument that their right to a hearing before the California Coastal Commission was guaranteed by the First Amendment, and should not be barred by the doctrine of unclean hands, at the oral argument at the hearing on Respondent's demurrer, which took place on April 2, 1996. This is contained in the record at page 000374 of the "Reporter's Transcript" filed in the California Court of Appeal on November 1, 1996, and is reproduced herein at Petitioners' Appendix App. C-5, 6.

That federal issue was then raised in Petitioners' Opening Brief before the California Court of Appeal, and constituted the sole issue raised on petition for review to the California Supreme Court.

While each court below held that Petitioners' action was barred by the doctrine of unclean hands, none of the courts below specifically addressed Petitioners' First Amendment argument, rejecting it by implication only. *See*, Petitioners' Appendix at App. A-1, B-1, C-1.

C. Statement of Facts

Petitioners are an individual and numerous corporations who were charged with violating the California Coastal Act by purchasing and reselling 54 individual parcels of land in the Santa Monica Mountains. [JA pp. 001, 015-039] This purchase and resale allegedly violated the Coastal Act because the seller of the properties had earlier entered into an agreement with the Coastal Commission to deed restrict the properties so as to combine

the individual parcels into two larger parcels, in exchange for another, unrelated individuals' receipt of building permits. [JA pp. 015-039] This was done as part of the Coastal Commission's "TDC" [Transfer Development Credits] program. [JA pp. 015-039]

In being so charged with violation of the Coastal Act, a cease-and-desist order was imposed against Petitioners in August, 1992 [JA pp. 001, 015-039], *an order which no appellant has since violated.* However, Petitioners did challenge the validity of the deed restrictions underlying the cease-and-desist order, and the final judgment was in favor of the Coastal Commission, on the ground that the statute of limitations of challenging the deed restrictions had run six months after the restrictions were initially imposed. [JA pp. 062-065, 078-214] The issue of Petitioners' right to a hearing before the new panel of Coastal Commissioners requesting modification of the cease-and-desist order was not before that court, as only the issue of the right to challenge the validity of the deed restrictions was addressed in that earlier action. [JA pp. 062-065, 078-214]

In addition, the Coastal Commission countersued Petitioners for fines and penalties under the Coastal Act, and obtained a judgment in the amount of [presently] $15 million plus rescission of all of the property transactions. [JA pp. 062-065,078-214] As the Court of Appeals noted in their opinion at pp. 4-5, Petitioners' right to a hearing before the Commission based on changed circumstances was not an issue in that case and there is thus no preclusive effect on the instant action. [JA pp. 062-065, 078-214]

The issue presented to the Court of Appeals was extremely narrow: Do Petitioners have a First Amendment and statutory right to a hearing pursuant to the California Code of Regulations regarding a request for modification of the cease-and-desist order based on changed circumstances? [JA pp. 001, 278, 297]

The Coastal Commission hearings provide a limited public forum in which the applicants can bypass the lawyers and speak directly to the Commissioners. [JA p. 052] Here, the Petitioners have never before attempted to so address the Commissioners, and when they finally did present an application for a hearing because they felt that there were adequate changed circumstances to justify such a hearing, the attorneys for the Coastal Commission refused to allow it. [JA pp. 004, 039-046, 048-050, 054-056]

There can be no doubt that the Coastal Commission has the power, and in fact, Petitioners contend, the duty, to hear Petitioners' request for modification under C.C.R. § 13188 [JA p. 052], and that they could in fact determine that they, as opposed to the attorneys handling the litigation, no longer wished to enforce the cease-and-desist order to the same extent as their predecessors did under then existing circumstances. [JA pp. 015-037] It is never too late for parties to litigation to attempt to resolve their issues out of court. However, in the instant action Petitioners cannot make it past the attorneys' prosecuting this action against them, who refuse to allow a hearing before the new Commissioners. [JA pp. 048-050, 054-056]

V.

REASONS FOR GRANTING THE WRIT

A. Summary of Argument

The fact that Petitioners were found to have violated the Coastal Act does not give the Coastal Commission justification to disobey their own regulations or to trample Petitioners' First Amendment rights. At issue here is the Coastal Commission's attorneys' belligerent refusal to allow Petitioners' simple request to convene a statutory public hearing before the Commissioners, so that the Commissioners themselves can consider Petitioners' arguments. Petitioners are not asking for predetermined results from such a hearing, but rather seek only that this Court order the Commission to hold the requested hearing in the forum specifically dedicated for that purpose.

Administrative mandamus is the sole means of judicial review of the decisions of quasi-judicial bodies, such as the Coastal Commission. *See, e.g.*, P.R.C. § 30801 ["Any aggrieved person shall have a right to the judicial review of any decision or action of the Commission by filing a writ of mandate in accordance with Section 1094.5 . . . "]

Quasi-judicial decision-making bodies are frequently asked to adjudicate claims of persons who have been found to have committed some wrong related to the subject of their hearing. For example, the prison-appeal board has to decide grievances of criminals. Taking Respondents argument to its logical conclusion, every time the prison-board refuses to review an incarcerated felon's request for a hearing and this court is asked to review that refusal in a mandamus proceeding, the board

can argue "unclean hands" by virtue of the felon's criminal history and thereby avoid a parole hearing altogether. Justice demands that state agencies carry out the law as applicable to them, which includes conducting fair hearings when mandated.

Moreover, Petitioners have never violated the cease-and-desist order that is the subject of this action, and therefore do not have "unclean hands" in relation to the actual subject matter of this action. Judge Essegian specifically found that Petitioners' actions did not damage the environment in any way, and that there is no history of prior violations of the Coastal Act by Petitioner. In fact, Petitioner Bogart was found in violation of the Coastal Act simply because he was found to have had "constructive knowledge" of the sale-restrictions, and was held personally liable only as a discovery sanction. [JA pp. 159-163]

On demurrer to Petitioners' petition for administrative mandamus and again on appeal, the Coastal Commission argued that the Petitioners' request for a hearing to modify or rescind the cease-and-desist order 1) was barred by the prior judgments, as a matter of res judicata; 2) that the commission had properly exercised its discretion not to grant a hearing; 3) that the claim for relief was moot, in light of the outstanding injunction; and 4) that Petitioners were barred from mandamus by their unclean hands. [*Court of Appeals' Decision,* App. A-4][2] The trial

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[2] The decision of the Court of Appeals contains a footnote at this point which refers to "a copy of the commission's points and authorities below that is defaced with handwritten and in one instance vulgar comments" Petitioners' counsel is puzzled

court agreed with the Coastal Commission and dismissed the entire action on demurrer.

The California Court of Appeals, however, rejected each of these arguments by the Coastal Commission with the exception of agreeing that the petition for mandamus, and therefore the requested Coastal hearing, was barred by the doctrine of unclean hands. The Court of Appeals declined to determine whether or not title 14 of the California Code of Regulations, Section 13188[3] *mandates* a hearing whenever there are changed circumstances and

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by this notation, as the copy of the Joint Appendix in counsel's possession does not contain any "vulgar comment", and if any such comment was written on any of the five sets of documents provided to the Court of Appeals, it was entirely inadvertent and must have been on the "original" document used by a clerk of Petitioners' counsel while researching the instant action but did not copy in the duplication process. Petitioners' counsel was certainly not aware of any such comment, and the only two notations in counsels' copy of the appendix are that the "attack was on the permits", in reference to the cease-and-desist order, and the general comment that "the commission is not aware of the facts". While such comments certainly have no place in an appendix of documents submitted to the court, it was purely a clerical error when the appendix was compiled to use a notated (but nonetheless entirely complete) document rather than a clean copy, and counsel submits that such an error, consisting of the accidental inclusion of notes made by an employee of counsel's, should not be allowed to reflect negatively on Petitioners.

[3] Title 14, Code of Federal Regulations, Section 13188, Subdivision (b), states that modification or rescission must be preceded by a public hearing, and that upon receipt of such a request "a hearing on the request *shall* be held . . . " (Italics added.)

the party so requests. [*Court of Appeals' Decision*, App. A-6.]

In determining that the doctrine of unclean hands barred Petitioners' request for a hearing, the California Court of Appeals did not address the core of Petitioners' argument, that Petitioners' First Amendment rights should not be precluded by the doctrine of unclean hands, particularly where, as here, the exercise of Petitioners' rights would neither aid nor perpetuate any illegal, immoral or otherwise wrongful activity but rather could in fact alleviate the "unclean hands" complained of by Respondents.

Petitioners thus seek review by this Supreme Court on the issue of whether or not Petitioners' First Amendment right to a hearing before a limited public forum designated for that purpose may be abridged by the state agency's belief that the speaker is undeserving of the use of the forum, *i.e.*, that the speaker has "unclean hands" because of his violation of a court judgment ordering him to rescind certain property sales and purchase transactions.

B. Petitioners' First Amendment Rights Should Not Be Extinguished By The Discretionary Equitable Doctrine Of Unclean Hands, And Petitioner Should Not Be Disentitled From The State Agency's Review Process For His Contempt of Court In Another Action

It is indisputable that constitutional rights are given great deference by the courts, and that First Amendment rights to free speech and to petition the government for

redress are considered fundamental, afforded the highest of priority in any action requiring a balancing of interests or otherwise. *See, e.g., Mississippi Gay Alliance v. Mosley,* 536 F.2d 1073 (1976), *citing Police Dept. Of Chicago v. Mosely,* 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). While in years past an action in equity meant the administration of justice according to the "free-wheeling ethical discretion" of the evaluator, modern jurisprudence has greatly restricted the "discretionary" nature of equitable relief and requests for relief are evaluated according to definite standards. *See, Roland Machinery Co. v. Dresset Industries, Inc.,* 749 F.2d 380, 382-88 (7th Cir. 1984).

Thus, the doctrine of unclean hands is properly applied only when the equitable remedy would otherwise encourage, or reward, illegal activity. *E.g., Johnson v. Yellow Cab Transit Co.,* 321 U.S. 383, 88 L.Ed. 814, 64 S.Ct. 622 (1944), *Everet v. Williams* (Ex. 1725), reported in *Note, The Highwayman's Case,* 35 L.Q. Rev. 197 (1893), and briefly discussed in *Prosser and Keeton on the Law of Torts,* § 50, at p. 336 n.4 (5th ed. 1984). As stated by Judge Posner:

> A common modern application of "unclean hands" is to intellectual-property cases in which an injunction is sought in aid of unlawful activity. If for example a plaintiff who had acquired a patent in violation of antitrust limitations on patent pooling brought a suit to enjoin another from using the patent, the injunction would be refused on the ground that awarding it would assist in a violation of the antitrust laws. *Frank Adam Elec. Co. v. Westinghouse Elec. & Mfg. Co.,* 146 F.2d 165 (8th Cir. 1945). Similarly, the owner of a trademark that was itself misleading, such as the trademark "Syrup of Figs" for a laxative

> that was not in fact a syrup of figs, could not get an injunction against the infringement of his mark. *Worden & Co. v. California Fig Syrup Co.*, 187 U.S. 516, 528, 539-40, 47 L.Ed. 282, 23 S.Ct. 161 (1903). An injunction would protect his misrepresentation.

Shondel v. McDermott, 775 F.2d 859 (7th Cir. 1985).

In the instant action, Petitioners' exercise of their free speech and redress right before the California Coastal Commission would in no way perpetuate any illegal activity whatsoever, and rather than encouraging any type of wrongdoing might actually cause a *settlement* of certain issues in dispute between the parties. Petitioners are not criminals, and should not be treated as such.

As the Court of Appeals noted, Petitioners' request for a hearing addresses the issue of lifting the cease-and-desist order so as to allow *future* transactions [*Court of Appeals' Decision*, App. A-6], whereas Petitioners' contempt is for failure to comply with an injunctive order to rescind *past* transactions, making the activities only tangentially related.

As the Court of Appeals correctly held, there *is no* res judicata, collateral estoppel, or mooting of the mandate Petitioner by virtue of the injunction or any previous court decisions, and that fact alone should defeat the application of the doctrine of unclean hands to the instant petition for writ of mandate: "Unless the courts insist on a *tight connection between the object* of the injunction *and the misconduct of the plaintiff*, suits for injunction will bog down in all sorts of collateral inquiries." *Shondel v. McCermott*, 775 F.2d at 869.

Most importantly, however, is the fact that the activity Petitioners ask this Court to protect is First Amendment activity. Judge Posner states the law most eloquently:

> The waiver by the Supreme Court in *Elrod* [*Elrod v. Burns*, 427 U.S. 347, 49 L.Ed.2d 547, 96 S.Ct. 2673 (1976)] of proof of irreparable harm in preliminary-injunction cases under the First Amendment rests on the view that the balancing of equities that is undertaken in a conventional equity case is out of place in dealing with rights so important as the modern Supreme Court considers the rights of expression to be. Equitable defenses such as unclean hands may also have more limited play in free-speech cases then elsewhere. There is an analogy to antitrust law, where the Supreme Court has forbidden the recognition of a similar equitable defense – *in pari delicto* (equally at fault) – in order to encourage antitrust enforcement. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 20 L.Ed.2d 982, 88 S.Ct. 1981 (1968). Last year this court refused to apply the doctrine of unclean hands in an antitrust case where the application of the doctrine would have defeated the objectives of antitrust law. *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 597 (7th Cir. 1984).

Shondel v. McDermott, 775 F.2d at 869-870.

Petitioners urge this Court not to allow the application of the unclean hands doctrine to the instant circumstances, where Petitioners are merely attempting to be allowed to exercise their first amendment rights to address a governmental entity in the time, place and

manner specifically mandated by state statute for such an address, and where Petitioners should not have been required to apply to the courts to exercise that right in the first place. In effect, the Commission's refusal to convene the requested hearing is a prior restraint on Petitioners' speech, operating to suppress Petitioners' speech solely on the basis of their previous conduct. *See, e.g., Lawson v. Murray,* 515 U.S. 1110, 132 L.Ed.2d 269, 115 S.Ct. 2264 (1995).

To allow the lawyers for Respondent California Coastal Commission to deny Petitioners the exercise of their first amendment rights, which are expressly protected by the Commission's own regulations, so as to *force* Petitioners into court to protect those rights via writ of mandamus, which they holds that Petitioners are "equitably" barred from any judicial consideration on the merits, is simply hypocritical.

In essence, to bar Petitioner from a hearing under this doctrine is to disentitle him not only from a court hearing, but also from access to an appropriate non-judicial forum, a Coastal Commission hearing. While the courts have under certain circumstances been allowed to disentitle fugitives from access to judicial protection, this "disentitlement doctrine" has been severely criticized in recent years by this Court as being excessive and unduly harsh *See, Degen v. United States,* 116 S.Ct. 1777, 135 L.Ed.2d 102, 1996 U.S. LEXIS 3719 (1996).

Justice Kennedy delivered the opinion in *Degen*:

> Without resolving whether Degen is a fugitive in all the senses of the word debated by the

> parties, we acknowledge disquiet at the spectacle of a criminal defendant reposing in Switzerland, beyond the reach of our criminal courts, while at the same time mailing papers to the court in a related civil action and expecting them to be honored. [citation omitted] A court-made rule striking Degen's claims and entering summary judgment against him as a sanction, however, would be an arbitrary response to the conduct it is supposed to redress or discourage.
>
> The right of a citizen to defend his property against attack in a court is corollary to the plaintiff's right to sue there. [citation omitted] For this reason we have held it unconstitutional to use disentitlement similar to this as punishment for rebellion and the United States, or, in at least one instance, for contempt of court. [citation omitted]

Degen v. United States, 116 S.Ct. 1777, 1996 U.S. LEXIS 3719, *15.

In *Degen*, the Petitioner was a fugitive from a criminal proceeding, taking advantage of Switzerland's refusal to extradite to the United States. In a civil forfeiture proceeding, the lower courts struck his answer and defenses, granting summary judgment against him, on the grounds that his fugitive status disentitled him from participating in any court proceedings at all. This Supreme Court reversed, holding that a court's dignity and "respect is eroded, not enhanced, by excessive recourse to rules foreclosing consideration of claims on the merits." *Degen v. United States*, 116 S.Ct. 1777, 135 L.Ed.2d 102, 1996 U.S. LEXIS 3710 (1996).

Here, Petitioner has been held in contempt of a judgment arising out of a court proceeding related to the instant action only in that both pertain to properties purchased and, in some cases, resold by corporations in which Petitioner is an officer. Not only has this Court at least once held that the fugitive disentitlement doctrine should not apply in contempt of court cases, *Hovey v. Elliot*, 167 U.S. 409, 413-414, 42 L.Ed. 215, 17 S.Ct. 841 (1897), but, as in *Degen*, the extra-judicial proceeding from which Petitioner is barred is only tangentially related to the court judgment of which he is held in contempt and which he is presently appealing to this Court.

Because the only issue presented herein is whether Petitioner has a right to address the California Coastal Commission directly in an attempt to have the cease-and-desist order modified or rescinded, there is no danger that the court's time will be wasted on an unenforceable judgment.

Finally, because the outcome of the hearing could result in an out-of-court resolution of the issues between the Petitioners and the Coastal Commission, there can be no harm in letting Petitioners exercise their First Amendment rights in an attempt, however ill fated, to have the actual Coastal Commissioners (rather than the Commission's lawyers) reconsider the outstanding cease-and-desist order.

VI.

CONCLUSION

Because the California state courts below have applied the unclean hands doctrine against Petitioner without considering Petitioners' First Amendment rights to free speech and to petition to government for redress, and allowed the state agency Respondent to prevent its citizens from addressing the agency in the time, place and manner specifically designated for such speech by the agency's own regulations, Petitioners respectfully pray that this Court grant certiorari.

DATED: October 7, 1997

Respectfully submitted,

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APPENDIX A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

PETER D. BOGART et al., Plaintiffs and Appellants, v. CALIFORNIA COASTAL COMMISSION, Defendant and Respondent.	B103320 (Super. Ct. No. SS006369) (Filed Apr. 28, 1997)

Peter D. Bogart and his affiliated corporations appeal from the judgment, following demurrer, denying their petition for writ of mandate, which sought to require defendant California Coastal Commission (commission) to hold a hearing on a request to modify or rescind a cease and desist order. We affirm.

FACTS

As supplemented by court records of which the trial court properly took judicial notice, the petition below reflected the following. In 1992 the commission entered a cease and desist order against plaintiffs (Pub. Res. Code, § 30810), requiring them not to sell or transfer certain lots

in Malibu without fully complying with certain previously recorded restrictions. The background of this order is described in our prior decision which affirmed the dismissal of two lawsuits by which plaintiffs challenged it. (*Ojavan Investors, Inc. v. California Coastal Com.* (1994) 26 Cal.App.4th 516 (*Ojavan*).)

In brief, in 1979 and 1980 the commission issued development permits to two landowners, conditioned on their extinguishing residential development rights on other properties (so-called transfer of development credits). The permittees accordingly contracted with two other landowners, for consideration, to file declarations of restrictions consolidating the lots on their properties with respect to sale, development, and other elements. In 1991, however, plaintiffs purchased from one of those landowners 49 of the former lots, and proceeded to sell 16 of them to third parties, in violation of the restrictions. The commission responded with the cease and desist order. The order provided that it "shall remain in effect permanently unless and until rescinded by the Commission."

In a third superior court action by plaintiffs (*Ojavan II*), the commission cross-complained for relief with respect to the completed sales of the restricted lots. The commission for relief with respect to the completed sales of the restricted lots. The commission prevailed, and the court entered judgment imposing civil fines totaling nearly $10 million. Having found that Bogart was the alter ego of the corporate plaintiffs, the court further enjoined him to rescind the illegal lot sales. (The landowner who had sold plaintiffs the lots also was enjoined

to rescind that transaction, following Bogart's reacquisition of the lots.) Plaintiffs appealed, and the appeal was argued and submitted on January 16, 1997. (*Ojavan Investors, Inc. v. California Coastal Com.* B089152.)

In the interim, plaintiffs refused to comply with the injunction requiring rescission, and were held in civil contempt. In successive proceedings, each preceded by a further period of noncompliance, the court fined plaintiffs $55,000, which was not paid, imposed house arrest on Bogart, and then ordered him committed to county jail (Code Civ. Proc., § 1219). Bogart's petitions for habeas corpus to the superior court and Court of Appeal were denied, and the Supreme Court denied review. A further, federal habeas petition also was denied. However, Bogart apparently evaded custody, as a fugitive.

In September 1995, plaintiffs filed with the commission an application and request "to modify, rescind and cancel" the cease and desist order, including a request for a hearing, as provided for by Title 14, California Code of Regulations, section 13188, subdivision (b)(§ 13188).[1]

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[1] The subdivision provides in relevant part: "The commission, after public hearing, may rescind or modify a cease and desist order that it has issued. A proceeding for such a purpose may be commenced by (1) any person to whom the cease and desist order is directed. . . . Upon receipt of a request pursuant to this subsection (b) for rescission or modification of a cease and desist order issued by the commission, a hearing on the request shall be held at the next regularly scheduled meeting or as soon thereafter as is practicable after notice to all persons subject to the order or whom the executive director otherwise has reason to know would be interested in the matter."

Plaintiffs' application for rescission cited as changed conditions the reduction, by "retirement," of land available for affordable housing in the area of the restricted lots, which plaintiffs characterized as suitable for that purpose. Plaintiffs also asserted certain legal arguments against the cease and desist order and the underlying restrictions, which had already been rejected in *Ojavan, supra,* 26 Cal.App.4th 516. By letter from its counsel, the commission rejected the application, without holding a hearing, essentially on grounds it was precluded by the judgments in the prior cases between the parties.

Plaintiffs then filed the instant petition for writ of mandate, praying that the commission be required to hold a hearing on their application of rescission. The commission generally demurred to the petition, on four grounds: (1) that it was barred by the prior judgments, as a matter of res judicata; (2) that the commission had properly exercised its discretion not to grant a hearing; (3) that the claim for relief was moot, in light of the outstanding injunction; and (4) that plaintiffs were barred from mandamus by their unclean hands. The trial court sustained the demurrer, without leave to amend, on all four grounds. It then entered judgment dismissing the proceeding, and imposing $1,127 in sanctions on plaintiffs, pursuant to Code of Civil Procedure section 128.7.[2]

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[2] Plaintiffs do not argue the issue of sanctions apart from contending that the ruling on the demurrer was erroneous.

DISCUSSION

The parties revisit the four grounds on which the trial court decided the matter. We examine each.

Plaintiffs' petition was not shown to be barred by res judicata. The prior judgments in *Ojavan* and *Ojavan II* did establish the validity of the cease and desist order and the underlying restrictions, and the illegality of plaintiffs' sales in violation of those restrictions. But the present proceeding concerns a different subject matter and "primary right," namely the commission's denial without a hearing of plaintiffs' administrative application for rescission. Plaintiffs' present cause of action arose only with the summary rejection of their application in late 1995.

The record reflects that in 1994 plaintiffs did file, in Ventura County Superior Court, another petition for writ of mandate, to compel the commission to afford a hearing on an earlier application to rescind the cease and desist order. The commission prevailed on that petition. That judgment, however, also does not constitute res judicata with respect to the present petition and its denial. Neither of them could have been asserted in the Ventura action, because neither had yet occurred.[3]

The contention that the present petition was "moot," because rescission of the cease and desist order would

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[3] Conceivably, the Ventura judgment might have created a collateral estoppel with respect to the general issue of the commission's responsibility to afford a hearing under section 13188. But there is no showing that that issue was actually decided by the judgment. Indeed, the court's ruling was based, at least in part, on jurisdiction.

not release plaintiffs from the injunctive restraints imposed in *Ojavan II*, does not follow. The injunction requires rescission of accomplished lot sales. The cease and desist order prohibits future lot sales. That plaintiffs are presently required by injunction to unwind their prior sales does not preclude them from obtaining effective relief from the cease and desist order's restraint against other sales.

The commission's position that section 13188 does not mandate a hearing on a request to rescind a cease and desist order is more troublesome. On its face, the regulation states that modification or rescission must be preceded by a public hearing, and that upon receipt of such a request "a hearing on the request *shall* be held. . . ." (Italics added.) The commission contends, however, that this language should be construed to incorporate a precondition that the request for rescission genuinely show changed circumstances, "such that a new hearing does not result in a re-hashing of failed arguments." Otherwise, the commission contends, it would be "harassed by repeated requests for rehearing."

We agree that modification or rescission of a cease and desist order, like modification or dissolution of a judicial injunction, should depend upon a showing of changed circumstances. (Cf. Civ. Code, § 3424, subd. (a).) And certainly, a hearing on a request for such relief is not the proper forum for a retrospective request for "rehearing" of the original decision. On the other hand, the commission's prediction of disarray if hearings were allowed on meritless applications is less convincing. The commission is capable of controlling the order and relevance of proceedings before it, without dispensing

entirely with the hearing apparently required by section 13188.[4] Moreover, the commission's proposed interpretation of the regulation would require courts – including this one, presently – to review the sufficiency of the application without completion of administrative proceedings and a fully informative record. The result could well be two burdensome rounds of judicial review of an application's disposition.

We need not, however, resolve the issue of whether a hearing is always required under section 13188. For we conclude that the trial court was justified in dismissing this proceeding on the final ground tendered, plaintiffs' unclean hands.

Unclean hands is an equitable doctrine that bars relief to a litigant "who has violated conscience, good faith or other equitable principles in his prior conduct." (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 727.) The doctrine has long been held applicable to proceedings for extraordinary writs, including writs of mandate. (8 Witkin, Cal. Procedure (3d ed. 1985) Extraordinary Writs, § 137, p. 778.) For example, in *Funfar v. Superior Court* (1930) 107 Cal.App. 488, a petition for writs of prohibition and mandate against the superior court was denied, on demurrer, because the petitioner was guilty of disobedience of a decree of the court in the same action, amounting to contempt. We stated that a party cannot seek the aid of a

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[4] The record indicates that the instant cease and desist order was the first ever issued by the commission under Public Resources Code section 30810. How many more such orders are outstanding has not been shown.

court "while he stands in an attitude of contempt to its legal orders and processes" (*id.* at p. 490), and therefore that the petitioner could not "invoke the process of this court so long as he thus continues to be in contempt of the superior court." (*Id.* at p. 491.)

Here, similarly, plaintiffs violated the superior court's injunction in *Ojavan II*, and were found in contempt for it. There is no indication that they have purged themselves of that contempt, or had done so at the time of the ruling below. While occupying that position with respect to the superior court's directive to rectify their violations that engendered the cease and desist order, plaintiffs were equitably disentitled to seek relief from that court with regard to that order.

Plaintiffs contend that their disobedience and contempt should be viewed merely as a means for challenging the validity of the injunction by habeas corpus. (See 6 Witkin, Cal. Procedure, *supra*, Provisional Remedies, §§ 329-330, pp. 277-280.) But in fact, Bogart's California habeas corpus proceedings were concluded, and the validity of the injunction to that extent upheld, before plaintiffs commenced the present proceeding. The trial court properly denied the petition for writ of mandate on the basis of unclean hands.[5]

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[5] The joint appendix in this appeal includes a copy of the commission's points and authorities below that is defaced with handwritten and in one instance vulgar comments. Only by grace has this violation not resulted in sanctions against the counsel and parties responsible. (See Cal. Rules of Court, rule 5.1(i)(1).)

DISPOSITION

The judgment is affirmed.

NOT FOR PUBLICATION.

/s/ Fukuto , J.
FUKUTO

We concur:

/s/ Boren , P.J.
BOREN

/s/ Nott , J.
NOTT

APPENDIX B

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PETER D. BOGART, etc., et al., Petitioners, v. CALIFORNIA COASTAL COMMISSION, Respondent.	No. SS006369 ~~[PROPOSED]~~ JUDGMENT RE DISMISSAL AND SANCTIONS (Filed Apr. 19, 1996) DATE: April 2, 1996 TIME: 1:30 p.m. PLACE: Dept. B TRIAL DATE: None DISCOVERY CUT-OFF: None MOTION CUT-OFF: None

On April 2, 1996, at 1:30 p.m., in Department B of this Court, located at 1725 Main Street, Santa Monica, California 90401, the Hon. Alan B. Haber presiding, Respondent California Coastal Commission's ("Coastal Commission") general demurrer, request for judicial notice in support of the demurrer, and motion for sanctions came on regularly for hearing. California Deputy Attorney General Daniel A. Olivas appeared on behalf of the Coastal Commission. James Fosbinder, Esq. of the firm of Fosbinder & Fosbinder appeared on behalf of Petitioners Peter D. Bogart, Ojavan Investors, Inc., Port Lemoore Corporation, Sutton Properties, Inc., Sealubber, Inc., Pakid Agency Ltd., Quelimane Corp., Highland Group, Inc., and P. U. Enterprises ("Petitioners").

Upon due consideration of the demurrer, request for judicial notice, and request for sanctions, and any opposition raised by Petitioners, and having ordered dismissal with prejudice of the petition and having ordered the imposition of sanctions as against Petitioners,

IT IS ORDERED, ADJUDGED AND DECREED THAT

1. With respect to the Coastal Commission's request for judicial notice pursuant to Evidence Code section 452, which was not opposed by Petitioners, the Court grants the request and therefore, considers the judicially noticed court documents in conjunction with the Coastal Commission's general demurrer.

2. The Court sustains the Coastal Commission's general demurrer without leave to amend because the petition does not state facts sufficient to constitute a cause of action. The Court finds that Petitioners cannot

cure the pleading defects through amendment, and Petitioners have not suggested any manner by which their petition could be amended to state a cause of action. The general demurrer is sustained without leave to amend because: the petition is barred by the doctrine of *res judicata*; the petition is moot; Petitioners have unclean hands; and California Code of Regulations section 13188, subdivision (b) is not mandatory.

3. With respect to the Coastal Commission's motion for sanctions, the Court grants the motion as to Petitioners in the amount of $1127.00 to be made payable to the Coastal Commission within twenty (20) days of April 2, 1996, the date the Court ordered dismissal with prejudice of this action. The Court also finds that the Coastal Commission has met the "safe harbor" requirements of Code of Civil Procedure section 128.7. The Court finds that the petition is frivolous and filed for an improper purpose (as defined by Code of Civil Procedure section 128.7) for the following reasons: (a) this action represents the sixth unsuccessful lawsuit filed by Petitioners against the Coastal Commission challenging the Coastal Commission's enforcement of Declarations of Restrictions recorded on the subject real property pursuant to prior coastal development permits; (b) before and after the instant action was filed, the Coastal Commission informed Petitioners in writing that the action was barred for various reasons including *res judicata* by virtue of the related decision of *Ojavan Investors, Inc. v. California Coastal Com.* (1994) 26 Cal.App.4th 516, *cert. denied* (1995) ___ U.S. ___, 115 S.Ct. 1097, 130 L.Ed.2d 1065; and (c) despite two written warnings from the Coastal Commission that the Commission would seek relief under Code

of Civil Procedure section 128.7 if Petitioners refused to dismiss voluntarily this action. Petitioners refused to do so.

DATE: APR 13 1996

JUDGE ALAN B. HABER
HON. ALAN B. HABER
JUDGE OF THE SUPERIOR COURT

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT WE B JUDGE ALAN B. HABER

PETER D. BOGART, etc., et al., Plaintiffs, vs. CALIFORNIA COASTAL COMMISSION, Defendant.	No. SS 006 369

TRANSCRIPT OF PROCEEDINGS

April 2, 1996

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[p. 1] LOS ANGELES, CALIFORNIA; TUESDAY, APRIL 2, 1996

DEPARTMENT WE B JUDGE ALAN B. HABER

APPEARANCES:

Counsel for the Plaintiffs, JAMES FOSBINDER, Esq.; counsel for the Defendant, DANIEL OLIVAS, Esq.

THE COURT: Number 32, Bogart versus California Coastal Commission.

MR. OLIVAS: Good afternoon, your Honor. Daniel A. Olivas, Deputy Attorney General, on behalf of moving party, Coastal Commission.

MR. FOSBINDER: Good afternoon, your Honor, James Fosbinder appearing on behalf of Mr. Bogart.

THE COURT: All right. Anything not in the written materials that you want me to consider?

MR. OLIVAS: No, your Honor.

MR. FOSBINDER: Yes, your Honor.

THE COURT: What's not in there that you want me to consider?

MR. FOSBINDER: Well, first of all, I'm at a loss as to why the Court finds this to be frivolous. The law that – the law clearly –

THE COURT: Well, first of all, what you're really telling me in different words is that you don't agree with the tentative ruling, and that's certainly fair.

MR. FOSBINDER: I think it's something that hasn't been addressed previously in the papers, and I've looked through them today.

THE COURT: Yes?

[p. 2] MR. FOSBINDER: Everything that's gone before involved an attempt by Mr. Bogart to say that the Coastal Commission could not do something. What Mr. Bogart asked us was whether or not he had the right –

THE COURT: Asked who?

MR. FOSBINDER: Excuse me?

THE COURT: Asked who? You said, "us," I don't know who "us" means.

MR. FOSBINDER: The law firm.

THE COURT: Yes.

MR. FOSBINDER: And some other lawyers. And we consulted with Mr. Borbeau (phonetic) from Boston.

THE COURT: Now, please, let's not –

MR. FOSBINDER: We talked to the lawyers. The point here is that –

THE COURT: You talked to a Boston lawyer about an issue involving the California Coastal Commission?

MR. FOSBINDER: Indeed we did.

THE COURT: All right. That's interesting.

MR. FOSBINDER: The point here is that all of the previous proceedings involve Mr. Bogart attempting to say that the Coastal Commission could not do something.

THE COURT: Right.

MR. FOSBINDER: He asked whether or not he had the right to go back to the Coastal Commission to give them reasons why they should not, even if they had the right to do it. And that's what we're attempting to do, to present reasons why the coastal commission should not do what the [p. 3] courts have clearly indicated that they have the power to do at this point.

As I read the statute it says that if you ask for a hearing, you're entitled to it. And we've asked for it. And we're not going back to say that you can't do this, we're going back to give reasons why they should not do it.

THE COURT: What's your –

MR. FOSBINDER: Policy reasons, reasons of practicality and reasons that benefit everyone. And we're asking to do that, except that it doesn't seem as though we have to ask, it seems as though we're allowed to do that as a matter of right.

THE COURT: Well, certainly, no one quarrels with your right to seek equitable relief. The question is really with respect to the issue of why did I in my tentative indicate that I feel that the petition was frivolous? What you're really addressing, and the question

really is, the wisdom of seeking the relief under – seeking equitable relief under all of the circumstances.

MR. FOSBINDER: Yes, your Honor.

THE COURT: And I've tried my best without going into page after page of a tentative ruling, to indicate a number of the reasons why I came to the conclusion that, one, the petition deserves to be – have a demur sustained without leave to amend. And furthermore, it wasn't my idea, it's the state's idea to seek sanctions for the filing of a – what they consider to be a frivolous lawsuit.

All I can tell you is that they make a very [p. 4] compelling presentation to justify the imposition of sanctions. And I'll be happy to reiterate. I'm going to have to make a record in any event.

But, before I do that, is there anything else that you want me to consider?

MR. FOSBINDER: Yes, your Honor. The right to petition the government for grievances is a first amendment right.

THE COURT: No one is taking away –

MR. FOSBINDER: Mr. Bogart is not coming here demanding – I'm sorry. If you want to interrupt me, you obviously may.

THE COURT: Do I want to what? Do I want to what?

MR. FOSBINDER: I was –

THE COURT: What did you just say? Do I have to have it read back?

MR. FOSBINDER: No. No. I was deferring. I said if you want to interrupt, go ahead. I'd rather hear what you were going to say, rather than be responding to something that you weren't interested in.

THE COURT: Anything further?

MR. FOSBINDER: Yes. It's a first amendment right to petition the right of government.

THE COURT: Yes. Thank you. I need to be reminded that there is a first amendment, right?

MR. FOSBINDER: All we're trying to do is to do that. To ask that the Coastal Commission listen to him, which is provided specifically in the state statutes that that's a right, not even a privilege.

[p. 5] THE COURT: What you're suggesting is that it would be error for any court to impose sanctions under 128.7, or if appropriate, 128.5 where someone files a frivolous lawsuit.

MR. FOSBINDER: No, your Honor.

THE COURT: And the defense is that after all the party was exercising his or her right to petition the government for grievances. I mean, there are limitations on the exercise of one's right.

MR. FOSBINDER: Yes. And I do believe that to be true. However, I think that, for instance, if Mr. Bogart were coming back to the Coastal Commission for the 50th time to have a new hearing to bring forward facts as to

why they should change their mind, at that point, and probably well before that point, it would be appropriate to do this. This is the first time that Mr. Bogart has come to the correct court to ask –

THE COURT: That's an interesting qualification, isn't it? In view of the fact –

MR. FOSBINDER: I did not –

THE COURT: How many other courts has he been before, and how extensive is the res judicata effect of at least two court decisions, that I can think of.

MR. FOSBINDER: There's only –

THE COURT: Not to mention the issue of whether or not he has, in the sense – in the equitable sense of the word, whether he has clean hands.

MR. FOSBINDER: If I may, your Honor. There's only one court decision which has a res judicata effect. And that [p. 6] would be –

THE COURT: That's enough.

MR. OLIVAS: And that's false, your Honor.

MR. FOSBINDER: That has nothing to do with what we're asking here.

THE COURT: All right.

MR. FOSBINDER: We're not asking whether or not the Court will insist that they do something. We're asking whether or not the Court will insist that they listen to Mr. Bogart, according to the state statute. And I am completely sincere in that. I have gone to several other lawyers –

THE COURT: I'm not questioning – Look, don't tell me about a Boston lawyer rendering advice on the California Coastal Commission. I'm not liable to be impressed.

MR. FOSBINDER: Gideon Canter (phonetic), one of the leading experts on property right litigation, who's had great success. And the Supreme Court is one of the lawyers we consulted with –

MR. OLIVAS: Gideon Canter lost in our case.

THE COURT: It's not your turn yet.

MR. OLIVAS: I apologize, your Honor.

THE COURT: You'll have an opportunity, I won't forget about you.

MR. OLIVAS: I apologize, your Honor.

THE COURT: All right. Yes?

MR. FOSBINDER: The point here is that could the Coastal Commission change its cease and desist order on its own. Obviously, the commissioners would have that right. [p. 7] If they have that right, why don't we have the right, as the state statute says, to go and ask them to do that.

THE COURT: I understand the question that you raise. Would you like to be heard?

MR. OLIVAS: Yes, your Honor. First of all, Mr. Fosbinder believes that this code section of the administrative code does away with res judicata, mootness and unclean hands doctrines. It does not, number one.

Number two, aside from the published case, they filed a suit in Ventura under this code section.

MR. FOSBINDER: I did not.

THE COURT: Excuse me. He was referring not to you personally, but to your client, Mr. Bogart.

MR. FOSBINDER: I understand.

MR. OLIVAS: Precisely, your Honor.

Under this code section, and there was a hearing on the merits, and that case was dismissed, and sanctions were imposed against Mr. Bogart and his other counsel. That suit was never appealed by Mr. Bogart. Accordingly, we have two cases –

THE COURT: That's final. I realize that.

MR. FOSBINDER: If I may, your Honor?

THE COURT: Yes.

MR. FOSBINDER: The decision in Ventura said that it's dismissed because Los Angeles Superior Court has exclusive concurrent jurisdiction over this matter. It was not a hearing on the merits. He said, "You're in the wrong place. Go away." By virtue of the fact he decided that they were [p. 8] in the wrong place, he couldn't possibly have made a decision on the merits. That would be impossible.

THE COURT: Well, I don't see that the Ventura case really – if you'll notice in my tentative ruling, it really doesn't factor into the equation at all.

MR. FOSBINDER: I understand.

THE COURT: I mean, it was certainly argued extensively, more than once by the attorney general in his moving papers. But, I really didn't know what to make of it. It had the feeling of a finality, but I couldn't be sure how it came to pass. But, it's really not critical. What's critical is the published BCA opinion that one has a res judicata effect. Two, the matter of clean hands, the evidence is clear.

Didn't the Coastal Commission obtain a permanent injunction requiring Mr. Bogart to –

MR. OLIVAS: Which is –

THE COURT: Excuse me. Let me just finish the sentence, it's a question. Isn't there a mandatory – an injunction mandating that Bogart, the Plaintiff, refund the purchase price to the persons that he sold the property to?

MR. OLIVAS: Yes, your Honor. And it's fully enforceable, and a bench warrant for Mr. Bogart's arrest is currently out for his contempt of court.

Judge Ruth Esigeon issued that order. As your papers show, there are three contempt orders against Mr. Bogart. That judgment – that injunction is not stayed. They never posted a bond.

[p. 9] MR. FOSBINDER: All of that –

THE COURT: Excuse me a minute. What are the amounts of outstanding fines that Bogart allegedly hasn't paid?

MR. OLIVAS: At the – Well, that's not part of the contempt, your Honor. In terms of the restitution to the –

THE COURT: Yes.

MR. OLIVAS: The restitution?

THE COURT: Yes.

MR. OLIVAS: It's about $100,000.

MR. FOSBINDER: In order to stay it, he would have had to posted $14,000,000.

THE COURT: So?

MR. FOSBINDER: That's not the point. The point is, it's on appeal. There is no res judicata effect from that decision whatsoever. The only part that there is res judicata effect upon is the original dismissal of Mr. Bogart's complaint against the Coastal Commission on whether or not they had the legal right to enforce the deed restrictions. That's the only thing that's been resolved permanently which has a res judicata or collateral estoppel effect. There is no res judicata or collateral estoppel effect if a matter is on appeal.

MR. OLIVAS: But, Mr. Fosbinder is mixing apples and oranges. With respect to the permanent injunction that goes to our mootness argument. That even if the Commission rescinded its order, we have an injunction, which is being enforced by Judge Ruth Esigeon. That's a separate order.

MR. FOSBINDER: Can I –

[p. 10] THE COURT: Excuse me.

MR. OLIVAS: And that is currently enforceable by contempt judgment, your Honor.

In terms of res judicata, that goes to legality of the deed restrictions and the C&D order.

MR. FOSBINDER: If I may reply very briefly to that?

THE COURT: Yes.

MR. FOSBINDER: With regard to the – That's okay. The deed – The last point he made, I'm sorry. I'm upset. Every time I represent Mr. Bogart, all I hear about is sanctions. It doesn't happen anywhere else with any other client.

THE COURT: I've had Bogart as a party before me before. I don't recall imposing any sanctions before. And if I had, I certainly don't –

MR. FOSBINDER: I recall my point. If I may?

THE COURT: Pardon?

MR. FOSBINDER: I recall my point. Thank you for giving me a second there.

The argument here is that this is totally moot. There's no point to having the Coastal Commission hear this plea, if you will, to rescind or change the order. It's simply not true.

Obviously the coastal commissioners, eight of which are new, were to change their minds, then we could drop the appeal, if they were so inclined, to ask that the order be changed to rescind it.

So, it's not moot. I mean, in fact, that's [p. 11] entirely probable that we would do that, if this were to occur.

THE COURT: All right. Anything further, gentlemen?

MR. OLIVAS: One last point.

THE COURT: Yes.

MR. OLIVAS: They wouldn't drop their appeal because there's about $13,000,000 in civil fines against Mr. Bogart.

THE COURT: How much?

MR. OLIVAS: It's up to about 13,000,000 at this point.

THE COURT: Here's the outcome. I'm going to reflect upon the sanctions certainly against counsel. I think I ought to reflect on that.

The demurrer is sustained to the petition for writ of mandate. I find the petition to be barred by the res judicata effect of the published BCA decision, upholding the right of the Coastal Commission to enforce the permits against the petitioner in connection with the cease and desist order issued by the Commission the Coastal Commission.

There are further grounds sent forth by the attorney general for the sustaining of the demurrer. The other is the unclean hands of petitioner. And in that connection I should indicate that the Court took judicial notice, per the moving parties request. And I refer specifically to the appendix submitted in support of the demurrer.

Further, the Court finds that the petition for writ of mandate is moot. The Commission obtained a judgment [p. 12] of permanent injunction, requiring petitioner to rescind the subject real estate contracts. Any permanent injunction would not be altered by any change in a cease and desist order by the Commission.

Further, I find that Section 13138(b) does not mandate the Coastal Commission to set a hearing or a further hearing on the cease and desist order.

Further, the Court finds the Plaintiff cannot cure the pleading defects.

With respect to the sanction order, the sanction request is granted as to – as against the Plaintiff, Bogart, pursuant to CCP 128.7. The attorney general has provided sufficient evidence to support the claim that the petition is frivolous. Accordingly, I'll require the petitioner to pay the sum of $1,129 to moving party within 20 days, pursuant to 128.7. I'm making the order pursuant to that section.

I find the moving party has met the safe harbor requirements, the noticed requirements, mandated by 128.7.

I will take under consideration – submission the issue of whether to impose that sanction sum against counsel, all counsel for the petitioner.

Moving party is to give notice of ruling.

MR. OLIVAS: Yes, your Honor. And should I submit a proposed judgment?

THE COURT: Yes. I suggest you wait a day until I decide what to do about sanctions against counsel.

MR. OLIVAS: Yes, your Honor. Thank you, your Honor.

[p. 13] MR. FOSBINDER: Thank you, your Honor.

THE COURT: You're welcome.

(Proceedings in the above-entitled matter were concluded.)

[p. 14] SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT WE B JUDGE ALAN B. HABER

PETER D. BOGART, etc., et al., Plaintiffs, vs. CALIFORNIA COASTAL COMMISSION, Defendant.	)	No. SS 006 369
STATE OF CALIFORNIA	)	
	)	ss.
COUNTY OF LOS ANGELES	)	

I, HORACE W. BRIGGS, a duly designated transcriber, do hereby declare and certify under penalty of

perjury that I have caused to be transcribed the portion of Tape 1 which was duly recorded in the Superior Court of the State of California County of Los Angeles, Department WE B, on the 2nd day of April, 1996, in the above mentioned case, and that the foregoing 13 pages comprise a true and correct, accurate transcription of the aforementioned tape.

Dated this 17th day of July, 1996.

/s/ Horace W. Briggs
Transcriber

APPENDIX D

FOSBINDER & FOSBINDER
Attorneys at Law
723 Ocean Front Walk
Venice, California 90291
(310)396-1071 (310)841-5640

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Attorneys for: Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PETER D. BOGART, an individual; OJAVAN INVESTORS, INC.; PORT LEMOORE CORPORATION; SUTTON PROPERTIES, INC.; SEALUBBER, INC.; PAKID HOLDINGS, INC.; MALEK AGENCY LTD.; QUELIMANE CO.; MTG ALLIANCE CORP.; HIGHLAND GROUP, INC.; AND P.U. ENTERPRISES Plaintiffs, v. THE CALIFORNIA COASTAL COMMISSION Defendants.	CASE NO. SS006369 VERIFIED PETITION FOR ADMINISTRATIVE MANDAMUS (C.C.P. § 1094.5; P.R.C. § 30801), OR IN THE ALTERNATIVE FOR WRIT OF MANDAMUS PURSUANT TO C.C.P. § 1085 (Filed Dec. 15 1995)

PETITIONERS ALLEGE AS FOLLOWS:

1. PETER D. BOGART is an individual. OJAVAN INVESTORS, INC.; PORT LEMOORE Inc.; SUTTON PROPERTIES, INC.; SEALUBBER, INC.; PAKID HOLDINGS, INC.; MALEK AGENCY LTD.; QUELIMANE CO.; MTG ALLIANCE CORP.; HIGHLAND GROUP, INC.; AND P.U. ENTERPRISES, are corporations. The individual and corporate entities will hereinafter be referred to as "Petitioners".

2. The CALIFORNIA COASTAL COMMISSION (hereinafter "Respondent"), is a state agency having secondary jurisdiction over development of real property lying within the California Coastal zone pursuant to the California Coastal Act. (Pub. Res. C. § 30300, et Seq.) Respondent is also the state agency authorized to issue cease and desist orders for purported violations of California Coastal Act. (Pub. Res. C. § 30801(a))

3. Petitioners hold various interests in lots located in Tract 9604. The subject properties are within the jurisdiction of Respondent, commonly known as the Coastal Zone.

4. On August 20, 1992, Respondent issued Permanent Cease and Desist Order number CCC-92-Cd-1 (hereinafter "ORDER") against Petitioners on the grounds that they purchased and resold the subject properties. Said Order expressly provides that it remains in effect until rescinded by Respondent.

5. In relevant part, the Order provides:

> Pursuant to the authority under California Public Resources Code Section 30810, the Coastal

> Commission hereby orders . . . [Petitioners] to cease and desist from the sale, conveyance or transfer in any manner of any interest in [various real properties] . . . unless said sale, conveyance or other transfer complies in all respects with the terms and provisions of those certain Declarations of Restriction recorded against said properties. . . . This order shall remain in effect permanently unless and until *rescinded by the Commission.* (Emphasis added.)

A true and correct copy of the Order is attached hereto and incorporated herein as Exhibit I.

6. On September 13, 1995, Petitioners made a written application and request for modification, rescission and cancellation of the ORDER, pursuant to Title 14, section 13188(b) of the California Administrative Code. In this application, Petitioners requested a hearing in accordance with section 13188(b). A true and correct copy of the application and the accompanying cover letter is attached hereto and incorporated herein as Exhibit 2.

7. On October 17, 1995, Respondent, through counsel, rejected Petitioners' application for modification of the Order without conducting a public hearing as required by section 13188(b). In its October 17 letter, Respondent stated that: "[I]t is not in our client's (i.e. Respondent) best interest to modify it [the Order], no rational ground to do so has been presented by you, and the Coastal Commission declines the invitation to modify or vacate the cease and desist order." Attached hereto and incorporated herein as Exhibit 3.

8. California Code of Regulations, Title 14, § 13188(b) states in part:

> The commission, after public hearing, may rescind or modify a cease and desist order that it has issued. A proceeding for such a purpose may be commenced by (1) any person to whom the cease and desist order is directed, . . . Upon receipt of a request pursuant to this subsection (b) for recision or modification of a cease and desist order issued by the Commission, a hearing on the request *shall* be held at the next regularly scheduled meeting or as soon thereafter as is practicable . . .

14 CA Admin. C. 13188(b) (emphasis added). Attached hereto and incorporated herein as Exhibit 4.

9. Section 13188(b) does not vest in the Commission the power to decide the merits of an application for modification or rescission prior to, or without, holding a hearing, and further mandates that a hearing be held upon request. Therefore Respondent's refusal to schedule a public hearing to consider the merits of Petitioners' application constitutes abuse of discretion.

10. The application for modification or rescission of the Order is a good faith, honest attempt to modify or rescind the ORDER based on changed circumstances pursuant to statutory authorization, and prior proceedings and judgments rendered by this court have no bearing on this application and do not bar the present action.

11. Petitioners have exhausted all available remedies.

Petitioners have repeatedly requested that Respondent reconsider their decision not to hold a hearing. See exhibits attached hereto. Respondent's recalcitrance has forced Petitioners to file the present petition for a Writ of

Mandate in order to have their day before the Commission and present their case in an open hearing. The present application for Mandamus is the only plain, speedy, and adequate remedy in the ordinary course of law. There are no provisions for an administrative appeal of the Commissions decision.

13. Respondent has the mandatory duty, as well as the ability, to schedule a public hearing to consider Petitioners' application.

WHEREFORE, Petitioners pray:

1. The court issue a peremptory writ commanding Respondent to hear and consider at its next regularly scheduled hearing, or as soon as thereafter is practicable, Petitioners' application for modification, rescission or cancellation of the Order,

2. Award Petitioners the cost of this proceeding; and,

3. Award Petitioners any other and further relief the court considers proper.

Dated: December 15, 1995

Fosbinder & Fosbinder

/s/ James H. Fosbinder
By: James H. Fosbinder
Attorneys for Petitioners

VERIFICATION BY PARTY

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a petitioner in the above-entitled action; I have read the foregoing

Petition for Writ of Administrative Mandamus, or, In the Alternative for Writ of Mandamus pursuant to CCP Section 1085

and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are stated upon my information or belief, and as to those matters I believe it to be true

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on December 15, 1995, at Los Angeles, California.

/s/ Peter D. Bogart
PETER D. BOGART
Petitioner

APPENDIX E

Bourbeau & Bourbeau, Bonilla & Tocchio, P.A.

50 Beacon Street
Boston, Massachusetts 02108

Telephone (617) 367-9695 Facismile (617) 367-9651

Mark S. Bourbeau, Esq.
Michael C. Bourbeau, Esq.*

Jeffery A. Tocchio, Esq.
Victoria M. Bonilla -Argudo, Esq.
T. David Raferty, Esp., Of Counsel

*also admitted in California

September 13, 1995

California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2216

RE: OJAVAN INVESTORS, INC. et al.

Dear Commissioners:

Enclosed please find an application to modify or rescind your previously issued Cease and Desist Order filed in the above referenced matter. Please calendar the same for hearing in accordance with the application.

Please stamp the enclosed copy of this letter as evidence of receipt of same.

Thank you for your cooperation. Please do not hesitate to contact his office if there are any questions with the above.

Sincerely,

/s/ Michael C. Bourbeau
MICHAEL C. BOURBEAU

Enclosures

MCB/lmb

cc. California Attorney General
300 So. Spring Street, Ste 5212
Los Angeles, CA 90013

MICHAEL C. BOURBEAU, ESQ., NO. 90773
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50 Beacon Street, Fourth Floor
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(617) 367-9695

Attorney for Applicants

BEFORE THE CALIFORNIA COASTAL COMMISSION

OJAVAN INVESTORS, INC.; HIGHLAND GROUP, INC.; PORT LEMOORE CORPORATION; SUTTON PROPERTIES, INC.; MALEK AGENCY, INC.; PAKID HOLDINGS, INC.; QUELIMANE COMPANY; P.U. ENTERPRISES, INC.; M.T.G. ALLIANCE CORPORATION; SEALUBBER INC.; and PETER BOGART, Applicants.	CCC 92-CD-1

APPLICATION AND REQUEST TO MODIFY, RESCIND AND CANCEL "CEASE AND DESIST ORDER 92-1-CD-1" AND TO CONVENE A HEARING (CCR 13188B)

COMES NOW each of the above-referenced Applicants who hereby submit this application to modify, cancel and/or rescind the "Cease and Desist Order 92-CD-1 of August, 1992 pursuant to CCR Section 13188b. Said Order has produced considerable and extremely costly litigation, part of which is before the California Court of Appeals, Case No. 2d Civil No. 8089152. Applicants

respectfully submit this application in an effort to put an end to the litigation, without any waiver or withdrawal of the claims put forth therein, and to bring before the Commission certain important circumstances that were not previously considered. Applicants, therefore, respectfully request the Commission to set a hearing hereon. Applicants base this petition upon the following specific grounds:

1. Tract 9604 (M.B. 141/55-58) is located along Latigo Canyon Road, some 4 miles north of the Malibu coast line. The 54 lots, which are in issue by this application, of the 138-lot tract have minimal, if any, nexus to the principal goals of the Coastal Act, to wit coastal access and public recreation.

2. There are and have been significant changed conditions since the initial Order in the immediate surrounding area, including at least 8 construction permits issued by the Commission during the past year along Latigo Canyon Road. At least 2 permits have issued to people associated with the Commission, one of these being the Don Schmitz' lot which abuts one of Applicants' lot.

3. Although these individual lots have been the subject of prior and current litigation, the courts have avoided dealing with this Cease and Desist order, ruling instead that the applicable statute of limitations which was based on the predecessor in interest's purported private restrictions barred the then pending court action challenging the restrictions. None of the above Applicants, however, have ever sought or applied for a "coastal permit" and by this application merely seek to modify the restrictions based on changed conditions. Applicants are

not builders or developers, only investors seeking to resell the lots for residential use all in accordance with their intent at the time of their good faith purchase of said lots.

4. Tract 9604 is a legally subdivided Tract, suitable for affordable single-family dwellings. The Commission, pursuant to P.R.C. § 30600.1 and Gov. Code § 65590 is expressly required to promote affordable housing.

5. Tract 9604 has the infrastructure that permits construction immediately.

(a) Latigo Canyon Road is a two-lane, county-maintained paved highway with outlets to Pacific Coast Highway and Mulholland Drive.

(b) Each individual lot is charged with a water stand-by charge by the Metropolitan Water District, showing availability of water.

(c) Each individual lot is charged annually with school bond payments, showing availability of schools.

(d) Lots in the immediate vicinity have percolating effluent systems – approved by the Commission and L.A. County.

(e) The 54 lots vary in size from approximately 16,000 square feet to approximately 6,500 square feet and are therefore eminently suitable for "affordable" single-family dwellings. The lot prices are clearly affordable and have been offered by Applicants at public auction for a $8,000 minimum bid per lot. This compares favorably with "affordability" of other Malibu area land, where approximately $200,000 per acre is a minimum and even

condominium or townhouse lots are unavailable below $40,000 per unit.

6. The Supreme Court has now enforced the law relating to changes in configurations of subdivided lands, which was always *exclusive* under procedures of the Subdivision Map Act (SMA), Sections 66451.10 to 66451.21 of the Government Code (merger of existing lots). The Supreme Court's holding in *Morehart v. County of Santa Barbara*, (1994) 7 Cal. 4th 700, 29 CR2d 804, 872 P2d 143, has firmly established that "combinations" of existing individual lots are unlawful and void.

As a consequence of *Morehart*, the Commission should modify, rescind and cancel all the purported "recombinations" of the 54 individual lots in Tract 9604.

7. The Commission is requested to vacate and cancel all "restrictions" which "damage" any portion of the individual 54 lots in Tract 9604 by restricting the use and transferability of these lots. The Commission is free to exercise its secondary permitting powers if and when a development application is filed, following county approval.

8. Other significant changed circumstances, that have occurred since the cease and desist order was issued, are the numerous recent acquisitions by the conservancy of land which is to be "retired" from development. In the "Thorne" permit report, the Commission found that there are 1,200 available small lots for development in 1990, in the Malibu-Topanga coastal zone. In addition, the "Bob Hope" project in Malibu, which was planned for 300 (and perhaps 600) individual lots has been "retired" by the Conservancy, as has the Barbra

Streisand 20-acre plus land to a single (legal) residence; a large Topanga area tract (planned for approximately 100 homes) belonging to people believed to be associated with Disney has also been "retired" from development. The approximately 120 acre Escondido Canyon parcel of Fairfax Savings (Blankenship) previously zoned for some 24 individual lots and situated below Tract 9604, is now being acquired by the Conservancy also. Also so many transfer development credits (TDCs) have become available that they are now being offered for sale in "bulk."

As a result of such "retiring" hundreds of existing lots or lots ready for building permits, the supply of "available" and "affordable" lots for low and moderate income persons has decreased significantly.

9. Opening up the 54 "affordable" individual lots in Tract 9604 will comply with and further the basic goals of the Commission. Many Malibu-area workers will be spared from congested Pacific Coast Highway and lengthy trips to and from work, traveling on under used Latigo Canyon Road instead. Living in clear air, protected by ocean breezes from Los Angeles area smog and residing in decent, affordable homes are desirable social, economic and cultural goals.

10. The "Thorne" project, which was the claimed resulting consideration of the restrictions on Tract 9604, has not come to fruition since 1990, and, in fact, has been a disaster. Eight (of 18) lots were in a flood hazard area and 9 (of 18) lots were in geological hazard areas. The trust deeds were parceled out to approximately 150 investors, and all 18 lots were foreclosed on in 1994 which has resulted in more than 150 owners of small pieces of 18

lots. Not a single building has been "developed" during the past five years.

11. There are numerous precedents for Commission action to modify and change its prior actions, even after full implementation of its permits. For example, the "Leanse" permit, No. A-337-79 (of 12/19/79), was modified in April 1993 by document No. 94-66948 and 9466950, recorded January 1994, although the very permit allegedly became "final" in 1979. Among the "modifications" recorded administratively by the Commission are documents 94-2266813, 94-2266814, 94-2266815, 93-1972637, 90-1778919, 88-1313961, 87-0598851, 87-0598845 and many more, all in Los Angeles County official records.

12. It appears that reference to the "Leanse" (in fact "Tourtelot") permit is in error and misquoted in the Order. That portion of the Cease and Desist Order referring to lots purportedly restricted pursuant to the "Leanse permit," A-337-79 of December 19, 1979 must be corrected and canceled as void.

13. The purported authority for issuance of the Cease and Desist Order of August, 1992 is based on a "new" section added to the Public Resources Code effective January 1, 1992, PRC Section 30010. This law is unconstitutional on its face, and unconstitutional as applied, as it has purported to penalize any action dealing with "coastal permits *previously* issued" and thus it is in direct violation of the "ex-post facto" prohibitions of the Constitution. Applicants respectfully request the Commission to right its own wrong and correct this manifest injustice.

WHEREFORE, it is respectfully requested:

1. That the matter be placed on the Commission's agenda for the next regularly scheduled Commission meeting as required by 14 CCR Section 13188b.

2. That the Commission cancel and rescind its Cease and Desist Order 92 CD 1, and the temporary cease and desist order of John Bowers, for one executive Director (unnumbered).

3. That the rescission and cancellation of the Cease and Desist Order be made retroactive nunc pro tunc to the date these orders were issued.

4. That the Commission record in official records of each County where the effects of such Commission orders and restrictions have been made public an official notice that such orders and restrictions have been rescinded and are null and void.

5. For such other relief as may be just and proper.

Date: September 12, 1995

Respectfully submitted,

BOURBEAU & BOURBEAU,
BONILLA & TOCCHIO

/s/ Michael C. Bourbeau
By: MICHAEL C. BOURBEAU
Attorney for Applicants

APPENDIX F

Second Appellate District, Division Two,
No. B103320
S061480

IN THE SUPREME COURT OF CALIFORNIA

PETER D. BOGART Et Al., Appellants

v. (Filed Jul. 9, 1997)

CALIFORNIA COASTAL COMMISSION, Respondent

Appellants' petition for review DENIED.

GEORGE
Chief Justice

APPENDIX G

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE SECOND APPELLATE DISTRICT

DIVISION: 2

Fosbinder & Fosbinder
James H. Fosbinder
723 Ocean Front Walk

Venice, CA. 90291

RE: Bogart, Peter D.
vs.
California Coastal Commission
2 Civil B103320
Los Angeles NO. SS006369
Judge: HABER, A.

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 04/07/97 is now final.

* * Affirmed In Full. * *

Respondent To Recover Costs.

JUL 25 1997
JOSEPH A. LANE,
Clerk

By: J. Chlanda

Deputy Clerk

FILED
NOV 4 1997
CLERK

No. 97-622

In The

Supreme Court of the United States

October Term, 1997

PETER D. BOGART, et al.,

Petitioners,

vs.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Two

RESPONDENT CALIFORNIA COASTAL COMMISSION'S BRIEF IN OPPOSITION TO PETITION

DANIEL E. LUNGREN
Attorney General

RODERICK E. WALSTON
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**Counsel of Record*

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OR CALL COLLECT (402) 342-2831

21pp

QUESTION PRESENTED

Whether the challenged state court decision is supported by a fully adequate and independent basis in state law – that Petitioners' action is barred by the doctrine of unclean hands?

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RESPONDENT CALIFORNIA COASTAL COMMISSION'S BRIEF IN OPPOSITION TO PETITION

Respondent California Coastal Commission ("Coastal Commission") respectfully requests this Court to deny the petition for writ of certiorari seeking review of the opinion of the California Court of Appeal. Citations herein will be to the opinion as it is reprinted at Appendix A to Petition for Writ of Certiorari (hereinafter "Pet., App. A").

JURISDICTION

Petitioners purport to invoke the jurisdiction of this Court under 28 U.S.C. section 1257(a). Jurisdiction, however, is lacking because the state court judgment is supported by an adequate and independent state law ground.

RELATED PETITION

Simultaneously with the instant petition, Petitioners filed a petition for writ of certiorari in related litigation. (*Ojavan Investors, Inc., et al. v. California Coastal Com.*, Supreme Court Docket No. 97-621.) The petitions are related because they both arise from the same factual circumstances.

REASONS FOR DENYING THE WRIT

The writ should be denied because the state court decision is supported by a fully adequate and independent basis in state law as embodied in the doctrine of unclean hands.

The instant action represents the *sixth* failed action filed by Petitioners Peter D. Bogart and his sham corporations arising from the California Coastal Commission's successful enforcement of two coastal development permits through its statutory cease and desist powers. The state and federal courts dismissed all six actions and the state court issued a decision specifically holding that *all* constitutional and other challenges to the subject permits, and the cease and desist order thereon, are barred by well-settled limitations and waiver principles. (*Ojavan Investors, Inc. v. California Coastal Com.*, 26 Cal.App.4th 516, 32 Cal.Rptr.2d 103 (1994), *cert. denied*, 513 U.S. 1148 (1995) (hereinafter *"Ojavan I"*).) The state court also granted the Coastal Commission affirmative relief in the form of a civil fine and a permanent injunction that requires Petitioners to rescind their illegal land sales and pay restitution to the defrauded third party purchasers. (*Ojavan Investors, Inc. v. California Coastal Com.*, 54 Cal.App.4th 373, 62 Cal.Rptr.2d 803 (1997) (*"Ojavan II"*).)

In related proceedings, the state court, on three separate occasions, held Petitioners in contempt of court for their unexcused refusal to comply with the permanent injunction. That contempt sanction has, in turn, resulted in the issuance of a bench warrant for Petitioner Bogart's arrest. Based on these and other facts, the state court

properly held that Petitioners "have unclean hands," thus barring their latest lawsuit.

STATEMENT OF THE CASE

Though the Statement of the Case is lengthy and complex, it is nonetheless necessary for a complete understanding of Petitioners' unsuccessful and frivolous six year battle against the Coastal Commission and the Commission's successful litigation under the Coastal Act. Many of the underlying facts have already been determined conclusively in the Coastal Commission's favor in *Ojavan I, supra,* 26 Cal.App.4th 516. Accordingly, where appropriate, the Coastal Commission will base factual references on the appellate record and/or the related *Ojavan I* decision.

A. The Underlying Facts

The Coastal Act of 1976, Public Resources Code sections 30000 *et seq.* ("Coastal Act"), "shall be liberally construed to accomplish its purposes and objectives." (Pub. Resources Code § 30009.) One such objective is to " '[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources.' " (*Ojavan I, supra,* 26 Cal.App.4th at 520, quoting Pub. Resources Code § 30001.5, subd. (a).) To satisfy this objective, the Coastal Commission established the Transfer of Development Credits Program ("TDC Program"). Under the TDC Program, new subdivisions and development projects in Malibu and the Santa Monica Mountains are approved

"on the condition that the project proponents arrange to extinguish, either by direct purchase or through involvement in government programs, the development capacity of other lots." (*Ibid.*) "The TDC Program thus conditions the issuance of coastal development permits on the extinguishment of development rights as to other building sites in the coastal zone, either by offering to dedicate a scenic easement or by filing declarations of restrictions, thereby waiving development rights and unifying separate lots into one parcel." (*Ibid.*) This litigation arises from the Coastal Commission's enforcement of two coastal development permits issued under the TDC Program.

On December 19, 1979, and May 10, 1990, the Coastal Commission issued coastal development permits to David Leanse and Larry Thorne ("permits"), respectively, for condominium and housing developments in the Malibu area within the coastal zone. (*Ojavan I, supra,* 26 Cal.App.4th at 521.) Messrs. Leanse and Thorne are not and have never been parties to any litigation between Petitioner Bogart and the Coastal Commission. (*Id.* at 523.) These two projects were not related to each other, but the Coastal Commission found that both projects created risks of adverse cumulative environmental impacts on coastal resources. (*Id.* at 521.) To mitigate such adverse environmental impacts, the Coastal Commission conditioned permit approval on the applicants' participation in the TDC Program. (*Ibid.*) Accordingly, as a condition precedent to issuance of the permits, the applicants agreed that they would provide evidence to the Coastal Commission that development rights for residential use had been extinguished on a specified number of building sites in the coastal zone near the proposed projects. (*Ibid.*)

The permit applicants fulfilled the TDC condition by purchasing, in the private market place, the right to have other, unrelated landowners record documents restricting development on privately owned lots. (*Ojavan I, supra*, 26 Cal.App.4th at 521.) One restriction, known as an Offer To Dedicate a Scenic Easement, extinguished the building rights on the subject lots by transferring such rights to the permit applicants' own properties. (*Ibid.*) The other restriction was embodied in four Declarations of Restrictions which "recombine[d] and unif[ied] the Subject lands into a single parcel for all purposes . . . including but not limited to sale, conveyance, development, taxation or encumbrance [so that] the proposed development is in conformity with the [Coastal] Act. . . . " (*Ibid.*) These declarations expressly state that any violation of the restrictions "shall render the landowners or their successors liable pursuant to the provisions of [the Coastal Act]." (*Id.* at 522.)

Pursuant to their respective agreements with the permit applicants, Petitioners' predecessors in interest recorded the Declarations of Restrictions on their lots between July 1981 and June 1990. (*Ojavan I, supra*, 26 Cal.App.4th at 521.) The result was that the 77 former individual lots were recombined into 2 larger lots. (*Id.* at 522.) Thus, either or both of the 2 newly-recombined lots could be sold, but the former 77 lots could *not* be sold-off individually. (*Ibid.*) Ultimately, the deed restricted lots arising from the separate Leanse and Thorne permit transactions came to be held by a common owner, Dan Bochner. (*Ibid.*)

In February 1991, without the knowledge or approval of the Coastal Commission and in violation of the

permits' restrictions (*Ojavan I, supra,* 26 Cal.App.4th at 522, 525), Petitioners purchased a total of 54 of the 77 deed restricted lots from Mr. Bochner (JA 161-162). Between April 2, 1991, and January 26, 1992, Petitioners sold a total of 19 deed restricted lots to third parties. (JA 162.) In the auction brochure, Petitioners stated:

> "Unbelievably cheap, due to restrictions on development. Economists tell us the government is broke, and only development money can fill the bureaucrats' maws. They'll *have* to develop!" (*Ojavan I, supra,* 26 Cal.App.4th at 522, emphasis original.)

After being alerted to these illegal purchases and sales of the deed restricted lots, Coastal Commission enforcement staff attempted to convince Petitioners to halt their illegal activities and voluntarily correct their violations of the Coastal Act. (*Ojavan I, supra,* 26 Cal.App.4th at 522.) When these efforts proved unsuccessful because Petitioners were intractable, the Coastal Commission was forced to issue both a temporary and a subsequent permanent cease and desist order to prevent a further breach of the Declarations of Restrictions. (*Ibid.*) The permanent order, which is the subject of the instant litigation, states in relevant part:

> "Pursuant to the authority under California Public Resources Code Section 30810, the Coastal Commission hereby orders [Petitioners and others] . . . to cease and desist from undertaking activities or from causing the undertaking of any and all activities which may result directly or indirectly in a violation of the California Coastal Act and specifically to cease and desist from the sale, conveyance or transfer in

> any manner of any interest in the real property described [herein] . . . unless said sale, conveyance or other transfer complies in all respects with the terms and provisions of those certain Declarations of Restriction recorded against said properties. . . . This order shall remain in effect permanently unless and until rescinded by the Commission." (Joint Appendix ("JA") 16.)

B. Litigation History

In July and October of 1992, Petitioners filed two complaints for damages and one petition for administrative mandate in the Los Angeles County Superior Court challenging the permits' deed restrictions, and the Coastal Commission's issuance of cease and desist orders thereon, alleging numerous constitutional and tort claims. (JA 96-117; *Ojavan I, supra,* 26 Cal.App.4th at 523.) The crux of Petitioners' allegations was that the permits' deed restrictions were invalid and could not be enforced. (*Ibid.*)

On the Coastal Commission's motions, the trial court dismissed all three of Petitioners' actions holding that the suits were barred by the Coastal Act's sixty day statute of limitations and by the doctrine of waiver. (JA 162; *Ojavan I, supra,* 26 Cal.App.4th at 523.) Petitioners appealed two of the three dismissals in the related actions, but the Court of Appeal unanimously affirmed the trial court's judgments. (*Ojavan I, supra,* 26 Cal.App.4th 516.) Finally, this Court denied Petitioners' petition for a writ of certiorari. (*Ojavan I, supra,* 513 U.S. 1148.)

In the first state court suit filed by Petitioners, the Coastal Commission filed and successfully litigated a

cross-complaint for violations of the Coastal Act. (JA 123-141.) On the Coastal Commission's motion for issue sanctions, the court pierced the corporate veil, thus finding Petitioner Bogart personally liable for each of the 73 violations committed by his corporations. (JA 166.) As relief, the court issued a permanent injunction that requires Petitioners to rescind each of the illegal sales of the deed restricted lots and make monetary restitution to the third party purchasers. (JA 155-157.) The court also imposed a civil fine. (JA 156-157.) On April 17, 1997, the appellate court affirmed the judgment in its entirety. (*Ojavan II, supra,* 54 Cal.App.4th 373.)

On August 29, 1994, Petitioners filed a fourth suit against the Coastal Commission – this time in the Ventura County Superior Court – wherein they again challenged the constitutionality of the permits' deed restrictions and the Coastal Commission's permanent cease and desist order. (JA 143-149.) The only new element in the Ventura suit (and which reappears in the instant action) was the allegation that the Coastal Commission, upon written request, had the absolute duty to consider in a formal hearing Petitioners' argument that the cease and desist order should be modified or rescinded altogether. (JA 145-146.) On September 12, 1994, after a hearing on the merits of the mandate petition, the trial court dismissed the action and imposed monetary sanctions on Petitioners and their counsel for filing a frivolous suit. (JA 151-152.) The court explicitly held, *inter alia,* that Petitioners "have not met their burden of proof" to support their allegation that the Coastal Commission abused its discretion in refusing to revisit, in a formal administrative hearing, the

cease and desist order. (JA 152.) Petitioners never appealed this decision.

After dismissal of Petitioners' fourth suit, and after Petitioners failed to comply with the permanent injunction, the state trial court issued an order to show cause re contempt and set a hearing for January 31, 1995. (JA 178.) In order to prevent the contempt hearing from going forward, Petitioners filed a new and separate federal lawsuit on January 9, 1995, against the Coastal Commission and the Superior Court pursuant to 42 U.S.C. section 1983, praying for injunctive and declaratory relief. (JA 189-206.) After full briefing by all the parties, the United States District Court for the Central District of California granted the Coastal Commission's motion to dismiss the federal lawsuit. (JA 208.) The court also granted the Coastal Commission's motion for Rule 11 sanctions of $9,975 against Petitioners and their counsel, the law firm of Fosbinder & Fosbinder, which also represents Petitioners in the instant litigation. (JA 209.) By memorandum opinion dated September 12, 1996, the United States Court of Appeals for the Ninth Circuit affirmed the sanctions order. (*Ojavan Investors, Inc. v. California Coastal Com.*, 97 F.3d 1460 (9th Cir. 1996) (unpublished disposition).) That federal litigation is now final.

C. The Instant Appellate Decision

As with the failed Ventura County action described above, the instant action arises from Petitioners' allegation that, notwithstanding the numerous adverse rulings and contempt citations, the Coastal Commission is *required* to revisit its issuance of the cease and desist

order upon Petitioners' written request. (JA 5.) Specifically, on September 13, 1995, Petitioners "made a written application and request for modification, rescission and cancellation of the [cease and desist] ORDER, pursuant to Title 14, section 13188(b) of the California Administrative Code." (JA 4.) That section provides in relevant part that "a hearing on the request shall be held at the next regular scheduled meeting or as soon thereafter as is practicable after notice. . . . " By letter dated October 17, 1995, the Coastal Commission, by and through its counsel, denied the application as "inappropriate" for many reasons, including the fact that the state and federal courts had repeatedly rejected all of Petitioners' arguments in support of their request to modify or rescind the cease and desist order and underlying permits. (JA 4-5, 48-50.) In the same letter, the Coastal Commission also warned Petitioners that if a "sixth action [is] filed against the Coastal Commission, . . . [the Attorney General's] office will act appropriately to protect the Coastal Commission and its interest, including seeking any relief [California Code of Civil Procedure] section 128.7 may afford." (JA 50.) Despite this warning, Petitioners filed yet another state court lawsuit on December 15, 1995. (JA 1.)

On March 11, 1996, the Coastal Commission filed a general demurrer arguing that the court should dismiss the action with prejudice. (JA 78-89, 92-212.) The Coastal Commission also filed a separate motion for the imposition of $1,127 in California Code of Civil Procedure section 128.7 sanctions against Petitioners and their counsel. (JA 215-276.) On April 19, 1996, after hearing, the trial court imposed the requested sanctions against Petitioners

and entered judgment dismissing their petition because it was "barred by the doctrine of *res judicata*; the petition is moot; Petitioners have unclean hands; and California Code of Regulations section 13188, subdivision (b) is not mandatory." (JA 338-339.)

On June 19, 1996, Petitioners appealed the above judgment. (JA 342-343.) On April 8, 1997, the California Court of Appeal affirmed in an unpublished opinion the dismissal, basing its decision solely on the unclean hands doctrine. (Pet., App. A.) After the California Supreme Court denied their petition for review, Petitioners filed the instant petition for writ of certiorari.

D. Bogart's Federal Habeas Petition

Petitioner Bogart also filed a separate petition for a writ of habeas corpus pursuant to 28 U.S.C. section 2254 in the United States District Court for the Central District of California on July 16, 1996. (Ex. A to Coastal Commission's Motion for Judicial Notice, at p. 3.)[1] As the District Court noted, Bogart sought "to challenge the underlying judgment in the civil case" which included the "permanent injunction that required [Bogart] to rescind each of the illegal sales of deed restricted lots and to make monetary restitution to the innocent third party purchasers." (*Id.* at pp. 4-5.) The Coastal Commission moved to dismiss the petition, arguing that dismissal was proper because Bogart was not in custody and he was a fugitive. (*Id.* at p. 6.) On October 25, 1996, the District Court

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[1] By order dated December 12, 1996, the California Court of Appeal granted the Coastal Commission's motion.

agreed with the Coastal Commission and also held that the petition was barred by additional grounds, including the abstention and exhaustion doctrines. (*Id.* at pp. 8-13.) On February 21, 1997, the United States Court of Appeals for the Ninth Circuit denied Bogart's request for a certificate of appealability, finding that he "has not made a substantial showing of the denial of a constitutional right." (Ex. A to Coastal Commission's Answer to Petition for Review by California Supreme Court filed below on June 5, 1997.)

ARGUMENT

Under California law, it is settled that equitable principles govern the issuance of a writ of mandate. (*Henneberque v. City of Culver City*, 172 Cal.App.3d 837, 843, 218 Cal.Rptr. 704 (1985); *see also* 8 Witkin, *California Procedure: Extraordinary Writs*, § 153, p. 950 (4th ed. 1997).) As noted above, not only has the Los Angeles Superior Court found that Petitioners knowingly and intentionally violated the Coastal Act, the court has also held Petitioners in contempt of court on three separate occasions for their unexcused refusal to comply with the court's permanent injunction, resulting in the issuance of a bench warrant for Petitioner Bogart's arrest. (JA 314-316.)

Indeed, in the first of three contempt orders, the trial court explicitly found that Petitioner Bogart and his sham corporations "have acted in *bad faith* in respect to their purported attempts to comply with the permanent injunction as shown by the declaration of Peter D. Bogart filed herein on or about November 16, 1994." (JA 315,

emphasis added.) Based on these facts, the trial court sustained the Coastal Commission's demurrer to Bogart's writ petition because he and his corporations "have unclean hands." (JA 346.) The California Court of Appeal agreed, holding in relevant part:

> "Unclean hands is an equitable doctrine that bars relief to a litigant 'who has violated conscience, good faith or other equitable principles in his prior conduct.' The doctrine has long been held applicable to proceedings for extraordinary writs, including writs of mandate. . . . We [have] stated that a party cannot seek the aid of a court 'while he stands in an attitude of contempt to its legal orders and processes,' and therefore that the petitioner could not 'invoke the process of this court so long as he thus continues to be in contempt of the superior court.' " (Pet., App. A at pp. A-7 to A-8, citations omitted.)

With this legal backdrop, the California Court of Appeal found that Petitioner Bogart and his corporations "violated the superior court's injunction in *Ojavan II*, and were found in contempt for it [and] [t]here is no indication that they have purged themselves of that contempt, or had done so at the time of the ruling below." (Pet., App. A at p. A-8.) Thus, the appellate court correctly held: "While occupying that position [of contempt] with respect to the superior court's directive to rectify their violations that engendered the cease and desist order, plaintiffs were equitably disentitled to seek relief from that court with regard to that order." (*Ibid.*)

Petitioners contend that the unclean hands doctrine should not be applied here because they "are merely

attempting to be allowed to exercise their first amendment rights to address a governmental entity in the time, place and manner specifically mandated by state statute for such an address. . . . " (Pet. at pp. 15-16.) In making this point, Petitioners rely upon case law that actually supports the decision of the state court. In *Shondel v. McDermott*, 775 F.2d 859 (7th Cir. 1985), the court *approved* the use of the unclean hands doctrine in intellectual property cases:

> "If . . . plaintiff who had acquired a patent in violation of antitrust limitations on patent pooling brought a suit to enjoin another from using the patent, the injunction would be refused on the ground that awarding it would assist in a violation of the antitrust laws. Similarly, the owner of a trademark that was itself misleading . . . could not get an injunction against the infringement of his mark." (*Shondel v. McDermott, supra*, 775 F.2d at 868.)

The reasoning in *Shondel* fully supports the state court's application of the unclean hands doctrine to bar Petitioners from seeking equitable relief when they have refused to do equity as required under the trial court's permanent injunction. Furthermore, the relief sought by Petitioners is inexorably intertwined with their contemptuous conduct: both the Coastal Commission's cease and desist order and the trial court's permanent injunction arose from Petitioners' illegal purchases and subsequent sales of deed restricted lots. Thus, the state court properly decided not to compel the Coastal Commission to revisit the cease and desist order because doing so would have rewarded Petitioners despite their contemptuous conduct. The First Amendment simply does not support

Petitioners' attempts to force the courts to revisit shop-worn and failed arguments. (*Funfar v. Superior Court*, 107 Cal.App. 488, 490 (1930) (writ petition properly dismissed on demurrer where petitioner guilty of contempt of court order in same action).)

Even if the First Amendment is somehow implicated in this case, the state court nonetheless acted within its discretion to bar Petitioners' suit under the unclean hands doctrine. For example, the court in *Shondel* cites *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968),[2] noting that *in pari delicto* equitable defenses may not be used to thwart private antitrust actions whose thrust is to enjoin in their entirety an anticompetitive scheme. This Court in *Perma Life* held that such defenses threaten the effectiveness of private antitrust actions which are a vital means for enforcing antitrust policy of the United States. (*Id.* at 138.) The Court premised its decision on the fact that the antitrust plaintiffs' "participation [in the allegedly anticompetitive scheme] was not voluntary in any meaningful sense" because plaintiffs were "attempt[ing] to make the best of a bad situation. . . . " (*Id.* at 138-141.) In the case at bar, Petitioners cannot claim that the Coastal Commission coerced them to violate the Coastal Act, prevented them from posting a bond to stay the injunction, drove them to violate the injunction, or compelled them into contempt. Disallowing the unclean hands defense under these circumstances would thwart the goals of the Coastal Act, undermine the state court's authority to enforce its own

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[2] Overruled on other grounds in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 755-756 (1984).

lawful orders, and reward Petitioners for their illegal and contemptuous activities.

Furthermore, if Petitioners truly wished to initiate out-of-court settlement discussions as they assert in their petition, they could have done so long ago by making an opening offer which the Attorney General would then have presented to the Coastal Commission as required by rule 3-510(A)(2) of the California Rules of Professional Conduct.[3] Alternatively, Petitioners have not and are not prevented from taking advantage of the Coastal Commission's public comment period, at the Commission's monthly meetings, where all members of the public may speak to the Commission on any matter relevant to the coastal zone. (*See* Coastal Commission's Answer to Petition for Review by California Supreme Court filed below on June 5, 1997, at p. 18.) Thus, rather than follow a constructive course of settlement negotiations, Petitioners instituted a half dozen actions against the Coastal Commission and Commission staff and counsel, resulting in a complete rejection of their theories. In the face of three contempt orders and a bench warrant for Petitioner Bogart's incarceration, Petitioners steadfastly refuse to comply with the injunction, thus preventing reimbursement to the defrauded third parties. This unexcused refusal to comply with the injunction demonstrates anything but a settlement mindset.

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[3] "A member [of the California Bar] shall promptly communicate to the member's client: . . . All amounts, terms, and conditions of any written offer of settlement made to the client. . . . " (Rules of Prof. Conduct 3-510(A)(2).)

In sum, Petitioners' First Amendment argument is nothing more than a sham. The state court properly held that Petitioners' writ petition is barred by the unclean hands doctrine.

CONCLUSION

The record in this and the related litigation is replete with examples of Petitioners' numerous and frivolous legal challenges to the Coastal Commission's enforcement of valid permit conditions. These challenges, however, have been bereft of sound legal authority or proper analysis of the facts. Furthermore, in the instant action, Petitioners present no grounds for review because the state court's application of the unclean hands doctrine to bar relief is based on well-established equitable principles. Petitioners' embrace of the First Amendment is nothing more than a ruse. Based on the above arguments and the undisputed record, the Coastal Commission respectfully requests that this Court deny the petition.

DATED: November 4, 1997.

Respectfully submitted,

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